(1)

88-280

No. _____

IN THE
SUPREME COURT OF THE
UNITED STATES

Supreme Court, U.S.
FILED
AUG 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

October Term, 1988

MICHAEL F. MCCARTHY and
HAROLD T. OKAHARA
Petitioners

vs.

THE UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL A. WEIGHT
Attorney at Law
A Law Corporation
Suite 430
735 Bishop Street
Honolulu, Hawaii
96813
(808)528-3255

Counsel of Record
for Petitioner
HAROLD T. OKAHARA

Of Counsel:
REINWALD, O'CONNOR,
MARRACK, HOSKINS &
PLAYDON

DENNIS EDWARD WATSON
O'CONNOR
JERROLD K. GUBEN
CHARLES EDWARD MCKAY
2400 PRI Tower
733 Bishop Street
Honolulu, Hawaii
96813
(808)524-8350

Counsel of Record
for Petitioner
MICHAEL F. MCCARTHY

QUESTIONS PRESENTED

(1). Is it a violation of the Fifth Amendment prohibition against Double Jeopardy to try petitioners for mail fraud when a trial court has already tried and acquitted them of participating in the underlying scheme to defraud?

(2) Notwithstanding the Fifth Amendment, is the government estopped from retrying the question of whether petitioners participated in a scheme to defraud --- when (a) that issue was squarely before the trial court; and (b) the court explicitly ruled there was no such participation?

(3). Did the trial court properly dismiss 29 mail fraud counts prior to trial when the 29 "mailings" in issue (a) consisted of pre-addressed envelopes

with no enclosures; (b) were sent as part of a pre-existing legal obligation; and (c) did not contain any misrepresentations?

PARTIES TO THE PROCEEDING

The parties to the proceeding were the United States, Defendant Michael F. McCarthy and Defendant Harold T. Okahara.

Defendants Curtis J. Bernhardt, Carl J. Bernhardt, and Daniel R. Matsukage were indicted together with McCarthy and Okahara. However, trial was bifurcated and McCarthy and Okahara proceeded to trial first.

The Bernhardts have not been tried and the arguments based on the Double Jeopardy Clause do not pertain to them. Matsukage is now deceased.

TABLE OF CONTENTS

PAGE

OPINIONS BELOW..... 3

JURISDICTION..... 4

CONSTITUTIONAL AND STATUTORY PROVISIONS..... 4

STATEMENT OF THE CASE..... 5

REASONS FOR GRANTING THE PETITION. 13

A. Retrial Of Petitioners On Any Part Of The Indictment Will Violate The Double Jeopardy Provisions Of The Federal Constitution..... 14

B. Decisions of this Court and other Circuits; Estoppel... 18

C. Sufficiency of the Indictment. 24

CONCLUSION..... 26

APPENDICES

PAGE

A. Opinion of the United States Court of Appeals, Ninth Circuit filed on February 25, 1988.....A-1

B. Order of the United States Court of Appeals, Ninth Circuit filed on March 30, 1988.....B-1

C. Order of the United States Court of Appeals, Ninth Circuit filed on April 5, 1988.....C-1

D. Order of the United States Court of Appeals, Ninth Circuit filed on April 8, 1988.....D-1

E. Order of the United States Court of Appeals, Ninth Circuit filed on April 8, 1988.....E-1

F. Order of the United States Court of Appeals, Ninth Circuit filed on June 16, 1988.....F-1

G. Pages 43 thorugh 48 of the Transcript of the Judgment of Acquittal Arguments held on September 30, 1985 before the Honorable Walter E. Craig.....G-1

TABLE OF AUTHORITIES

PAGE

CASES

Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 11189, 25 L.Ed.2d 469 (1970)..... 19

Carter v. Estelle, 677 F.2d 427 (1982)..... 20

Parr v. United States, 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960)..... 24

Pereira v. United States, 347 U.S. 1, 74 S.Ct. 358, 363, 98 L.Ed.2d 435 (1954)..... 25

Sedgwick v. Superior Court for the District of Columbia, 584 F.2d 1044 (D.C. Cir. 1978)..... 20

United States v. Allen, 539 F.Supp. 296 (C.D. Ca., 1982)..... 21

United States v. Baugus, 761 F.2d 506 (8th Cir. 1985)..... 20

United States v. Beecroft, 608 F.2d 753 (9th Cir. 1979)..... 18

United States v. Brutzman, 731 F.2d 1449 (9th Cir. 1984)..... 15

United States v. Genser, 710 F.2d 1426 (10th Cir. 1983)..... 21

United States v. Maker, 751 F.2d 614 (3d Cir. 1984)..... 21

United States v. Martin Linen Supply Co., 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977)..... 19

United States v. Mitchell, 744 F.2d 701 (9th Cir. 1984)..... 14

United States v. Scott, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978)..... 19

STATUTES

18 U.S.C. Section 371.....4, 5
18 U.S.C. Section 1341....4, 5, 6, 24
18 U.S.C. Section 1343..... 5
18 U.S.C. Section 3731..... 17
28 U.S.C. Section 1254(1)..... 4

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1988

MICHAEL F. MCCARTHY
and HAROLD T. OKAHARA
Petitioners

vs.

THE UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Michael F. McCarthy and Harold T. Okahara pray that this Court exercise its supervisory powers to review a set of related orders entered by the Ninth Circuit Court of Appeals. The effect of the appellate rulings is that the petitioners now face mail fraud charges based upon a "scheme to defraud" for which they have already been tried and acquitted.

The Ninth Circuit's pronouncements on this matter have been unusually convoluted, internally inconsistant and confusing. The petitioners request certiorari to review the following appellate orders, all of which concern the same subject matter:

(a) the initial Opinion of the appellate court filed on February 25, 1988 (Appendix A);

(b)the March 30, 1988 Order pertaining to the "standing" of McCarthy and Okahara (Appendix B);

(c) the April 5, 1988 Order amending the Februrary 28, 1988 opinion (Appendix C);

(d) the April 8, 1988 Order amending the March 30, 1988 Order (Appendix D);

(e) the April 8, 1988 Order further amending the April 5, 1988 Order and the February 28, 1988 opinion (Appendix E); and

(f) the June 16, 1988 Order in which the Ninth Circuit denied a petition for rehearing with suggestion of rehearing en banc (Appendix F).

OPINIONS BELOW

The Amended February 25, 1988 Opinion of the Ninth Circuit Court of Appeals (Appendix A) is reported at 840 F. 2d 1441 (9th Cir. 1988). The March 30, 1988; April 5, 1988; April 8, 1988 Orders (concerning the petition for rehearing and amendments to the February 25, 1988 Opinion) are not reported. The June 16, 1988 order denying rehearing is also not reported.

JURISDICTION

The Opinion of the Ninth Circuit Court of Appeals was entered on February 25, 1988. A timely petition for rehearing with suggestion for rehearing en banc was denied on June 15, 1988, and this petition for certiorari was filed within 60 days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1), and the Fifth Amendment of the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioners were initially charged with offenses under 18 U.S.C. Section 371, 1341 and 1343. Only the offenses under Section 1341 (mail fraud) are at issue here. Petitioners' Fifth Amendment arguments pertain to the Double Jeopardy clause which provides that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb".

STATEMENT OF THE CASE

On March 17, 1985, Curtis J. Bernhardt, Carl J. Bernhardt, Daniel R. Matsukage, Michael F. McCarthy, and Harold T. Okahara were charged in the United States District Court for the District of Hawaii with violations of 18 U.S.C. 371 (conspiracy), 18 U.S.C. 1341 (mail fraud) and 18 U.S.C. 1343 (wire fraud). The charges were brought in a 74 Count superceding indictment (the "indictment"). Count 1 alleged a conspiracy to commit fraud. Counts 2 through 74 described 73 alleged instances in which the mails or wires were used to further the scheme to defraud.

Prior to trial, Counts 2 thorugh 30 (describing 29 instances where the mails were used) were dismissed for failing to

state an offense against the United States. The trial court found that the mailings in Counts 2 through 30 were the result of a pre-existing legal obligation and were not sufficiently related to the underlying scheme to defraud to bring them within the reach of 18 U.S.C. 1341.

Trial was then bifurcated, with McCarthy and Okahara proceeding first. The Bernhardts were to be tried separately (and have not yet gone to trial). Matsukage is now deceased. In July and August, 1985 the government presented its case against McCarthy and Okahara.

After nine weeks of testimony and evidence from prosecution witnesses, at the conclusion of the government's case against McCarthy and Okahara, the petitioners moved for entry of a

judgment of acquittal. The trial court granted the motion and acquitted McCarthy and Okahara of all pending charges.

In doing so, the trial court specifically found that McCarthy and Okahara did not participate in the alleged conspiracy described in Count 1. More importantly, the trial court expressly found that the defendants did not participate in the underlying scheme to defraud. The pertinent portion of the trial court's findings is attached as Appendix G.

For purposes of this petition, it is critically important to note that there was a single alleged scheme to defraud which was common to <u>every</u> count of the indictment --- both the counts on which the defendants were tried as well

as the twenty nine counts which were dismissed prior to trial.

Count 1 (conspiracy) described the object of the conspiracy and the ways and means allegedly used to effectuate it. The 73 subsequent counts were collectively prefaced with the phrase "for the purpose of executing the aforesaid scheme and artifice to defraud". The indictment then went on to list the dates and adressees for the mailings, with each mailing constituting a separate count. Thus, Count 1 and Counts 2 through 74, by explicit reference, referred to a singular "scheme to defraud". The trial judge specifically found that the petitioners did not participate in that scheme to defraud.

The government initially appealed both the judgment of acquittal and the

pre-trial dismissal of Counts 2 through 30. The appeal of the judgment of acquittal was voluntarily dismissed. The government maintained its appeal pertaining to Counts 2 through 30.

Because the dismissal of Counts 2 through 30 occurred before trial was bifurcated, the trial court's ruling necessarily concerned all five defendants (Curtis Bernhart, Carl Bernhardt and Daniel Matsukage, as well as McCarthy and Okahara). This is probably where the confusion began.

The Ninth Circuit issued an initial opinion on February 25, 1988 stating that "collateral estoppel" did not bar the government from trying all the defendants on Counts 2 through 30. McCarthy and Okahara immediately filed a petition for rehearing, arguing (a) the trial court's rulings were determinative

as to these petitioners and did estop the government from retrying the same issue; and (b) regardless of the court's position on the estoppel question, the Fifth Amendment prohibition on double jeopardy absolutely prevented a second trial.

The basis of the petitioners' argument was simple. They, unlike the Bernhardts and Matsukage, had actually been tried. Jeopardy had attached and the trial court explicitly found that the petitioners had not participated in the underlying scheme to defraud. Under these circumstances, the Ninth Circuit's sweeping remarks about collateral estoppel may pertain to the other defendants but the appellate court's analysis should not and cannot apply to McCarthy and Okahara.

Apparently as a result of the petition for rehearing, the Ninth Circuit issued an order commanding the government to file a responsive brief. In doing so, the appellate court, sua sponte, directed the government to address McCarthy and Okahara's "standing" to participate in the appeal. (March 30, 1988 Order attached as Appendix B). This was followed by an amendment to the initial Opinion which stated that collateral estoppel did not bar the trial of the other defendants, Curtis and Carl Bernhardt. (June 5, 1988 Order attached as Appendix C). These amendments gave the clear impression that McCarthy and Okahara were viewed differently from the Bernhardts and would not be retried, obviously because of the adjudication on the merits in the lower court.

The Ninth Circuit then did an about face, issuing on June 8, 1988 a pair of Orders. The first directly contradicted the March 30, 1988 order, stating that there was no issue as to McCarthy's and Okahara's "standing". (Appendix D). The second order was in effect the third permutation of the February 25, 1988 Opinion. Whereas the second revision of the Opinion stated there was no bar to retrying the Bernhardts, the third redraft stated that collateral estoppel did not bar trial for <u>any</u> of the defendants, including the petitioners. (Appendix E). Finally, on June 16, 1988, the court of appeals summarily denied denied the request for rehearing and rejected the suggestion of rehearing en banc. (Appendix F).

REASONS FOR GRANTING THE PETITION

There are three reasons for this Court to exercise its supervisory power to review the decision and orders of the Ninth Circuit Court. First, the appellate court's error is of constitutional magnitude. If it is unchecked, double jeopardy is assured and the petitioners' Fifth Amendment rights will be violated.

Second, the Ninth Circuit's opinion directly conflicts with decisions of this Court as well as decisions of other Circuits on the preclusive effect of a prior acquittal.

Third, the Ninth Circuit's opinion directly conflicts with this Court's rulings on the sufficiency of allegations of mail fraud in an indictment.

A. A Retrial Of Petitioners On Any Part Of The Indictment Will Violate The Double Jeopardy Provisions Of The Federal Constitution.

This case presents novel but compelling circumstances for the application of the Double Jeopardy protections provided by the Fifth Amendment of the United States Constitution.

It is indisputable that the mail fraud counts which the government now seeks to resurrect have three necessary elements: (1) participation in a scheme to defraud, (2) causing the mails to be used, (3) for the purpose of executing the scheme. U.S. v. Mitchell, 744 F.2d 701, 703 (9th Cir. 1984) (to charge a violation of mail fraud statute, indictment must allege the formation of a scheme to defraud and a knowing use of

the mails in furtherance of the scheme); United States v. Brutzman, 731 F.2d 1449 (9th Cir. 1984) (necessary elements of mail fraud are participation in a scheme or artifice to defraud, causing the use of the mails for the purpose of executing the scheme.)

It is similarly indisputable that the question of whether petitioners participated in the underlying scheme to defraud was squarely before the trial court. The statements and findings of the trial judge make this clear.

As to Count 1 (conspiracy), the Honorable Walter E. Craig stated in entering a judgment of acquittal: "the Court finds that the prosecution has failed to present evidence from which any rational trier of fact could conclude that the defendants or either of them, were parties to any agreement

or conspiracy to commit either mail fraud or wire fraud or fraud against the United States, nor could any rational trier of fact conclude beyond a reasonable doubt from the evidence presented that the defendants or either of them, had the intent to commit either mail fraud or wire fraud or fraud against the United States." (Appendix G, page 44).

As to the other counts, Judge Craig determined: "the Court finds that the prosecution has failed to present sufficient evidence to allow any rational trier of fact to conclude beyond a reasonable doubt that the defendants, or either of them, were participants in any scheme or artifice to defraud, or any scheme or artifice to obtain money or property by false or

fraudulent pretenses". (Appendix G, page 45).

To state the obvious, a trial on the mail fraud allegations in Counts 2 through 30 necessarily involves a trial on each essential element of mail fraud. This, in turn, means that the government would have a second attempt at establishing that McCarthy and Okahara participated in exactly the same scheme to defraud for which they were acquitted. This "second chance" would place the petitioners in jeopardy twice on exactly the same issue. The Fifth Amendment does not permit this result.

Further, 18 U.S.C. 3731 (under which the government brought its appeal) provides that appeals by the United States may be taken "except that no appeal shall lie where the double

jeopardy clause of the United States Constitution prohibits further prosecution." Here, the double jeopardy clause does apply and the Ninth Circuit therefore had no authority to entertain the government's arguments, much less reverse the trial court's findings.

B. Decisions of this Court and other Circuits; Estoppel.

As a threshold matter, there is no dispute that proof of an underlying scheme to defraud is a required element of an offense actionable under 18 U.S.C. 1341. United States v. Beecroft, 608 F.2d 753, 757 (9th Cir. 1979) (substantive offense of mail fraud requires proof of a scheme to defraud).

It is well established in this Court as well as in the various circuits that a final judgment on an essential element of the charged offense bars a subsequent trial involving the same element. Ashe v. Swenson, 397 U.S. 436, 443, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469 (1970) (when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated betwen the same parties in any future lawsuit.)

In United States v. Scott, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978), this Court reaffirmed its position in United States v. Martin Linen Supply Co., 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977) that the pivotal task in double jeopardy cases is to "determine whether the ruling of the

judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the case."

The United States Court of Appeals for the District of Columbia has recognized this general rule and its application to double jeopardy/estoppel cases. See Sedgwick v. Superior Court for the District of Columbia 584 F.2d 1044 (D.C. Cir. 1978). So has the Fifth Circuit (Carter v. Estelle, 677 F.2d 427 (5th Cir. 1982) (citing the above passage from Scott); the Eighth Circuit (United States v. Baugus, 761 F.2d 506, 508 (8th Cir. 1985), (collateral estoppel is part of the fifth amendment guarantee against double jeopardy and precludes a second prosecution if such prosecution would require relitigation of specific fact

issues which have already been judicially determined); the Tenth Circuit (United States v. Genser, 710 F.2d 1426 (10th Cir. 1983) (citing the above passage from Scott); and the Third Circuit (United States v. Maker, 751 F.2d 614, 623 (3d Cir. 1984) (to determine whether Scott allows an appeal, the appellate court must consider whether the district court resolved in the defendant's favor an essential element of the offense charged).

On this issue, United States v. Allen, 539 F.Supp. 296 (C.D. Ca., 1982) is very instructive. There, the defendant was acquitted of conspiracy to commit mail fraud and substantive offenses of mail fraud. The government then sought to try the defendant on a second indictment arising out of the

same facts and circumstances. The court held:

> Since proof of the conspiratorial agreement is synonymous with proof of the scheme to defraud, the government's failure at the first trial to link defendant Richard Allen to the conspiracy necessarily indicated a lack of proof on the substantive mail fraud counts as well and the court accordingly entered a judgment of acquittal as to all charges. Given that this case involves a single conspiracy, it follows that the new scheme to defraud is actually the conspiratorial agreement litigated at the previous trial. Thus, even with the conspiracy count of the second indictment dismissed, the government, in trying the new substantive counts, would be relitigating the existence of the conspiratorial agreement. However, since Richard Allen has been acquitted of participating in that agreement, or scheme, trying him on the new substantive counts would permit relitigation of a fact already found in his favor. (539 F. Supp. at 308, 309) (citations ommitted).

In the instant case, this Court does not have to draw the inference (as the court did in Allen) that the "scheme

to defraud" alleged in the second trial is substantially similar to that alleged in the first proceeding. Here, the scheme to defraud is ver batim identical. The original indictment was merely cut into two "parts" prior to trial --- Counts 1 and 31 - 74; and Counts 2 -30. The "part" of the indictment on which petitioners were tried described exactly the same scheme to defraud as alleged in Counts 2 through 30.

The Ninth Circuit's decision is thus an anomaly which contradicts well-established precedent from this Court as well as decisions entered by the various circuit courts of appeal. Under these circumstances, review by certiorari is warranted.

C. Sufficiency of the indictment.

In addition to the foregoing, the Ninth Circuit's opinion conflicts with this Court's rulings in Parr v. United States, 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960). In Parr, this Court reversed a mail fraud conviction on the ground that mailings caused to be made under a duty imposed by law are not criminal under 18 U.S.C. 1341.

In the instant case, the indictment alleged in Counts 2 through 30 that the defendants caused pre-addressed envelopes to be mailed to mortgagors. The homeowners would then place their monthly mortgage checks in the envlopes to be sent to the mortgage servicing company --- which was under a pre-existing contract to collect and process the payments. It is not disputed that the envelopes were addressed correctly,

contained no "representations" other than the address, and were otherwise not "misleading".

The gravamen of the indictment was that mortgage payments went into a hopper and the defendants looted that hopper. There was no allegation that the mortgage payments would not have been made but for the mailing of the envelopes. Under Parr, this was not enough. The mailings must be part of the execution of the alleged fraud and must be an essential part of the scheme. Pereira v. United States, 347 U.S. 1, 8, 74 S.Ct. 358, 363, 98 L.Ed.2d 435 (1954). After reviewing the indictment in the light most favorable to the government, the trial court ruled that mailings in Counts 2 through 30 were not sufficiently closely related to the fraudulent scheme.

In any event, the petitioners have since been acquitted of any participation in the underlying scheme to defraud. Even if the mailings were "sufficiently closely related" to the fraudulent scheme, the mailings would still be moot ---- at least with respect to McCarthy and Okahara.

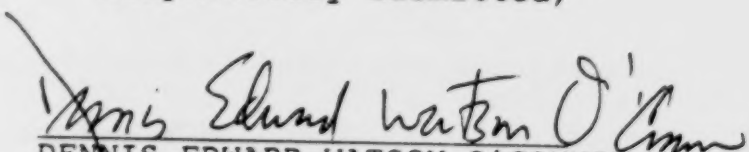
CONCLUSION

The opinion of the Ninth Circuit is contrary to the controlling decisions of this Court and is in direct conflict with precedent from every other circuit court of appeals.

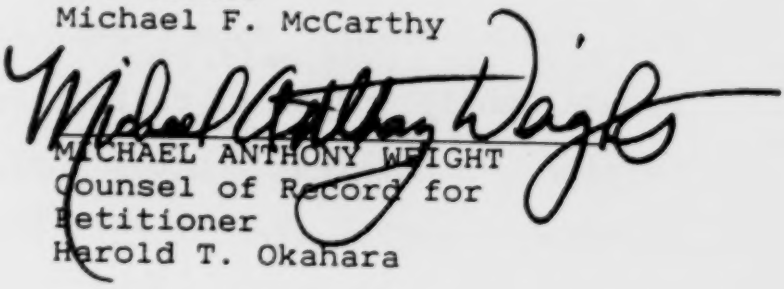
Moreover, if this Court does not exercise its power of supervision, double jeopardy is assured and petitioners' constitutional rights will be violated. McCarthy and Okahara

therefore request that a writ of certiorari issue.

Respectfully submitted,



DENNIS EDWARD WATSON O'CONNOR
JERROLD K. GUBEN
CHARLES EDWARD MCKAY
Counsel of Record for
Petitioner
Michael F. McCarthy



MICHAEL ANTHONY WRIGHT
Counsel of Record for
Petitioner
Harold T. Okahara

Certificate of Service

I hereby certify that on this 12th day of August, 1988, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Daniel Bent, United States District Courthouse, 300 Ala Moana Blvd., Room C-242, Honolulu, Hawaii 96813; John F. De Pue, Appellate Section, Criminal Div., Dept. of Justice, Washington D.C. 20530. I further certify that all parties required to be served have been served.

Michael Anthony Wright

Michael Anthony Wright

BEST AVAILABLE COPY

UNITED STATES of America
Plaintiff-Appellant,

v.

Curtis J. BERNHARDT, Michael F. McCarthy, Harold T. Okahara, Jr., and Carl J. Bernhardt, Defendants-Appellees.

No. 85-1250.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 14, 1986.

Decided Feb. 25, 1988.

Daniel Bent, U.S. Atty., and Frank A. Wilson, Asst. U.S. Atty., Honolulu, Hawaii, John F. De Pue, Crim. Div., Washington, D.C., for plaintiff-appellant.

Benjamin B. Cassiday, III, Asst. Federal Public Defender, Honolulu, Hawaii, for defendant-appellee Carl J. Bernhardt.

Peter A. Donohoe, Honolulu, Hawaii, for defendant-appellee Curtis J. Bernhardt.

Dennis E.W. O'Connor and Charles E. McKay, Hoddick, Reinwald, O'Connor & Marrack, Honolulu, Hawaii, for defendant-appellee McCarthy.

Michael E. Weight, Honolulu, Hawaii, for defendant-appellee Okahara.

Appeal from the United States District Court for the District of Hawaii.

Before SNEED, ANDERSON and POOLE, Circuit Judges.

POOLE, Circuit Judge:

The United States appeals the district court's dismissal of twenty-nine counts of a seventy-four-count indictment. The subject counts charged defendants Curtis Bernhardt, Carl Bernhardt, Michael McCarthy, Harold

Okahara (collectively appellees), and Daniel Matsukage with conspiracy to violate the mail fraud and wire fraud statutes of the United States, 18 U.S.C. 371, 1341, 1343 and 2. Sixty-five separate acts of mail fraud (Counts 2 through 66) and eight acts of wire fraud (Counts 67 through 74) were set forth. Upon the motion of the defendants and following the recommendation of a United States Magistrate, the district court dismissed certain of the mail fraud counts, holding, on the authority of Parr v. United States, 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960), that the mailings could not be held to have been made for the purpose of executing the alleged fraudulent scheme because they were normal business usages. We reverse and remand.

FACTS AND PROCEEDINGS

Daniel Matsukage was president of both Pacific Standard investment and Loan, Inc. (Pacific) and Real Estate Finance Corporation (REFC). Pacific is an industrial loan company authorized by Hawaii state law to solicit public funds for deposit and to make loans with these funds. REFC is a mortgage servicing company which has agreements with various mortgage companies to collect monthly mortgage payments from homeowners, deposit the payments into trustee accounts, and forward the balance of the monthly principal and interest to the mortgage companies after paying property taxes and other expense incurred on the serviced property.

Appellees were officials of Norfolk Investment Co., Limited (Norfolk).

Norfolk was established for the purpose of generating profits from investments in real estate and various other ventures.

By a superseding grand jury indictment, the government alleged that between December 1977 and December 1981, appellees and Matsukage operated these companies so as to carry out a broad scheme to defraud. Briefly, the scheme was said to have been as follows: Appellees and Matsukage organized and implemented depositor solicitation programs to attract depositors for Pacific. It was charged that they diverted funds from these programs into loans and disbursements to themselves as well as to REFC, Norfolk, and Norfolk's subsidiaries. To induce investments in Pacific, they artificially increased Pacific's capital stock, thereby

receiving large deposits which they used to pay off loans owed Pacific, creating the appearance that Pacific had a more favorable cash position than actually existed. In addition, they caused security and collateral for loans made by Pacific to be released, subordinated, and substituted for their own benefit. It was further charged that appellees and Matsukage covered up these activities by causing false entries to be made and published by Pacific concerning its financial status.

To provide Pacific and Norfolk with additional cash, appellees and Matsukage were alleged to have diverted funds collected by REFC from homeowners pursuant to the mortgage servicing contracts. Instead of forwarding the proceeds to the mortgage companies or applying them to satisfy property tax

7bills, defendants would use the money as operating cash to improve Pacific's deficit cash position, or they would divert the funds to Norfolk to support its various business enterprises. To conceal their scheme with respect to REFC, they were alleged to have made or caused to be made false entries, records, representations and omissions of material facts.

Count 1 of the superseding indictment charged appellees and Matsukage with conspiracy to commit mail and wire fraud in violation of 18 U.S.C. 371. Counts 2 through 30 charged separate acts of mail fraud, alleging that appellees and Matsukage caused the homeowners to mail their mortgage payments to REFC by sending the homeowners pre-addressed envelopes. Counts 31 through 65 alleged other mail

fraud violations, while counts 66 through 74 alleged separate criminal acts of wire fraud.

Following a magistrate's recommendation and report, the district court dismissed counts 2 through 30 charging mail fraud. These counts were severed to allow this appeal by the government.

Meanwhile, McCarthy and Okahara proceeded to jury trial on the conspiracy count and on the mail fraud and wire fraud counts that had not been dismissed (Counts 1 and 31 through 74). At the conclusion of the government's case in chief, McCarthy and Okahara moved for a judgment of acquittal. The district court granted their motion as to all counts on the grounds of insufficiency of evidence. The government appealed the judgment of

acquittal, but later moved to dismiss, recognizing that that appeal was barred by the Double Jeopardy Clause. By order of April 18, 1986 we granted the government's motion to dismiss that appeal.

In June 1986, the Bernhardts moved in district court to dismiss the counts surviving against them (other than those involved in this appeal). They claimed that since there had been a prior prosecution in Hawaii state court based largely upon the identical transactions set forth in the indictment and it had been dismissed by the state court because barred by the statute of limitations, further trial was barred by the Double Jeopardy Clause because the state and federal prosecutions were the same. They also claimed vindictive prosecution and collateral estoppel

arising from the acquittal of Okahara and McCarthy. The district court denied motions to dismiss based on collateral estoppel and vindictive prosecution, but granted the motion for double jeopardy indicating that it believed the two prosecutions were in effect the same. The government appealed the judgment granting dismissal on double jeopardy grounds. We reversed and remanded to permit the district court to make the factual determination essential to the applicability of Bartkus v. Illinois, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959). United States v. Curtis J. Bernhardt, et al., 831 F.2d 181, 183 (9th Cir. 1987). The Bernhardts' attempted appeals of the denials of their vindictive prosecution and collateral estoppel claims were dismissed as nonappealable prior to

trial. United States v. Curtis J. Bernhardt, et al., Nos. 86-1200 and 86-1201 (9th Cir. October 27, 1987) (unpublished) [831 F.2d 303 (table)].

This appeal involves the propriety and effect of the dismissal of Counts 2 through 30, and whether Curtis Bernhardt and Carl Bernhardt may yet be tried. Defendant Matsukage is deceased.

DISCUSSION

A. Reviewability

Pursuant to 28 U.S.C. 636(b)(1)(B), the district court designated a magistrate to conduct hearings and to submit to the court proposed findings of fact and recommendations for defendants' motions to dismiss the above-numbered counts of

the indictment.1 Any party may serve and file written objections as provided by rules of court within 10 days of service of the magistrate's report and recommendations. The district court must make a de novo review of those portions to which objection is made. Id. The Rules of the United States District Court for the District of Hawaii mirror the statute and provide that the district court may consider the record developed before the magistrate

---

1. Section 636(b)(1)(B) provides in part:

> a judge may * * * designate a magistrate to conduct hearings * * * and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A) * * *.

and need not conduct a new hearing unless required by law. Local Rule 404-2 of the United States District Court for the District of Hawaii.2 Appellees argue that the the government's failure to file written objections to the magistrate's report and recommendation within the ten days set forth in the statute and the local rules, caused waiver of its right to appeal the district court's decision adopting that recommendation.

[1] The failure to object to a magistrate's recommendation does not

---

2. Local Rule 404-2 provides that

> Any party may object to a magistrate's proposed order, findings, or recommendations * * * within 10 days after being served with a copy thereof. Such party shall file * * * written objections which shall specifically identify the portions of the proposed

(footnote continued on next page)

preclude appellate review under the statute. Britt v. Simi Valley Unified School District, 708 F.2d

---

2. continued
order, findings, or recommendations to which objection is made and the basis for such objections. Any party may respond to another party's objections within 10 days after being served with a copy thereof. A United States District Judge shall make a de novo determination of those portions of the report or specific proposed findings of recommendation to which dtermination is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The United States District Judge, however, will not conduct a new hearing unless required by law, and may consider the record developed before the magistrate, making his own determination on the basis of that record. The United States District Judge may in his discretion receive further evidence, recall witnesses or recommit the matter to the magistrate with instructions.

Local Rule 404-2 of the Rules of the United States District Court for the District of Hawaii.

452, 454 (9th Cir. 1983). Furthermore, the local rule does not indicate that the failure to file objections in district court bars a subsequent appeal. Nevertheless, appellees ask this court to exercise its inherent supervisory powers and require a party seeking review of a magistrate's decision to file objections within ten days or waive the right to appeal. Although the Supreme Court has held that a court of appeals may exercise its supervisory powers to establish such awaiver rule, Thomas v. Arn, 474 U.S. 140, 142, 106 S.Ct. 466, 468, 88 L.Ed.2d 435 (1985), we have declined to adopt such a rule. Britt, 708 F.2d at 454. In Britt, we held that failure to file objections waives only factual issues on appeal. Id.; accord McCall v. Andrus, 628 F.2 1185, 1187, 1189 (9th Cir.

1980), cert. denied, 450 U.S. 996, 101 S.Ct. 1700, 68 L.Ed.2d 197 (1981). Because the issues in this case are purely legal, the government has not waived its right to challenge the magistrate's recommendations and the district court's order dismissing Counts 2 through 30.

B. Dismissal of Counts Two Through Thirty

The dismissed mail fraud counts concern the mailings of mortgage and tax payments by homeowners to REFC in pre-addressed envelopes.3 Appellees

---

3. Section 1341, the mail fraud statute, provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * for the purpose of

(footnote continued on next page)

allegedly misappropriated this money for use by Pacific and Norfolk. Relying upon Parr v. United States, 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960), the magistrate recommended and the trial court ordered dismissal of these counts because the mailings were not made "in furtherance" of the scheme to defraud but were sent regularly and routinely as required by pre-existing servicing contracts with REFC,

---

3. continued

> executing such scheme or artifice or attempting so to do * * * knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing [whatever to be sent or delivered by the Postal Service], shall be be fined not more than $1,000 or imprisoned not more than five years, or both.
>
> 18 U.S.C. 1341 (1982).

mortgagors and mortgage companies. The district court adopted the magistrate's report and dismissed counts 2 through 30.

[2] An indictment is sufficient to withstand a motion to dismiss if it contains the elements of the charged offense in sufficient detail (1) to enable the defendant to prepare his defense; (2) to ensure him that he is being prosecuted on the basis of facts presented to the grand jury; (3) to enable him to plead double jeopardy; and (4) to inform the court of the alleged facts so that it can determine the sufficiency of the charge. United States v. Jenkins, 785 F.2d 1387, 1392 (9th Cir.), cert. denied sub nom. Prock v. United States, --- U.S. ---, 107 S.Ct. 192, 93 L.Ed.2d 125 (1986), and sub nom. White v. United States, ---

U.S. ---, 107 S.Ct. 288, 93 L.Ed.2d 262 (1986). Whether an indictment is sufficient to withstand a motion to dismiss is a legal question which this court reviews de novo. United States v. Buckley, 689 F.2d 893, 897 (9th Cir. 1982), cert. denied, 460 U.S. 1086, 103 S.Ct. 1778, 76 L.Ed.2d 349 (1983); see United States v. McConney, 728 F.2d 1195 (9th Cir.) (en banc), cert. denied, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984). In making our analysis, we presume that the allegations of the indictment are true. Buckley, 689 F.2d at 897.

To charge a violation of 18 U.S.C. 1341 or 1343, an indictment must allege facts demonstrating (1) the formation of a scheme to defraud, and (2) a knowing use of the mails in furtherance of the scheme. United

States v. Mitchell, 744 F.2d 701, 703 (9th Cir. 1984). Under the statutes, the mailings must be made or caused to be made "for the purpose of executing such scheme." United States v. Maze, 414 U.S. 395, 400, 94 S.Ct. 645, 648, 38 L.Ed.2d 603 (1974). Relying on Parr, appellees argue that the indictment could not be held to allege that the mailings by the homeowners or the transmission by wire were made in furtherance of the scheme to defraud.

In Parr, the Supreme Court held that tax statements, checks in payment of taxes, and receipts of tax payments mailed or caused to be mailed by a local school board were not sent in furtherance of a scheme to defraud the school district of its revenue. The Court said:

> it cannot be said that mailings made or caused to be made under the imperative command of duty imposed by state law are criminal under the federal mail fraud statute, even though some of those who are so required to do the mailing for the District plan to steal, when or after received, some indefinite part of its moneys.

Parr, 363 U.S. at 391, 80 S.Ct. at 1183-84 (emphasis supplied). Appellees argue that here, as in Parr, there was a pre-existing legal obligation to collect the mortgage and tax payments of the homeowners by virtue of REFC's contracts with the mortgage companies.

[3] Appellees, however, endow Parr with too broad a scope. As noted by the Court, the factual situation in Parr was unique. Id. at 391, 80 S.Ct. at 1183. There, the Board was legally required by state law to assess, collect, and receipt taxes. This was, in fact, one of the Board's primary duties as a

public corporation organized under state law. See id. at 374, 80 S.Ct. at 1174. Thus, it was the command of the state that compelled the mailings in that case independently of any contracts. By contrast, the mailings at issue in this case were made to REFC pursuant to the inducement of private contracts initiated by appellees. No preexisting legal obligation, federal, state or local, required homeowners to transmit their monthly mortgage payments or property taxes through a mortgage servicing company such as REFC. Instead, the obligation to remit these payments to REFC arose from REFC's causation. The superseding indictment alleged that Matsukage, president of REFC and Pacific, and appellees, officials of Norfolk, actively engaged in a community of activities to foster

the business interests of REFC. Consequently, appellees along with Matsukage controlled that company and used their positions to defraud the other parties to the mortgage servicing contracts.

Appellees contend that such a distinction is not controlling; that the Court's holding in Parr was founded on the premise that the mailings would legally have occurred in complete absence of the scheme to defraud. See United States v. Tarnopol, 561 F.2d 466, 472 (3d Cir. 1977) ("We do not believe there is a valid distinction to be drawn between those routine mailings which are required by law and those routine mailings, themselves intrinsically innocent, which are regularly employed to carry out a necessary or convenient procedure of a legitimate business

enterprise."). But see United States v. Brown, 540 F.2d 364, 377 (8th Cir. 1976) (if the use of the mails is a business practice and not otherwise legally required, then the limited immunity defense recognized in Parr is inapplicable). Appellees argue that the homeowners' mailings in counts 2 through 30 would have occurred even if appellees had not devised and implemented the alleged scheme because of the pre-existing contracts between REFC and the mortgage companies. See Mitchell, supra, 744 F.2d at 704.

In Mitchell, the defendant, a member of the city council, had used his position to secure the council's approval of a condominium conversion project. In return for his support of the project, he received more than $100,000 from the project's owner.

Mitchell had used the mails to defraud the city and his council colleagues by concealing the project owner's interest and Mitchell's hidden profit from the project's approval. Mitchell, citing Parr, raised the defense against a prosecution for violating 18 U.S.C. 1341 that since the mailings concerning the condominium project were independently required by law to be sent out before the project could be approved, they were not "in furtherance" of the scheme to defraud. We, however, distinguished Parr by noting that the mailings in Parr were sent out regularly and routinely and would have been mailed even if the scheme to defraud the District had not existed. In contrast, it was the defendant's fraudulent scheme that triggered the applicability of the

local law that required the mailings in Mitchell. Id.

While our Mitchell decision held that Parr does not insulate from federal prosecution mailings whose necessity under law was triggered by the fraudulent scheme, it is not necessarily dispositive here. The issue here is whether mailings required by a Private agreement, wherein one of the parties to the agreement is seeking to defraud the other, can be said to have been sent in furtherance of the underlying scheme to defraud. Neither Parr nor Mitchell dealt with such a circumstance.

As previously stated, the homeowners' duty to make the payments to REFC stemmed from contracts between REFC and various mortgage companies. The government alleged that appellees and Matsukage exercised control over REFC.

As parties to these servicing contracts through their control of REFC, appellees retained the power to control REFC's legal obligations under the contracts and hence the payments by homeowners to REFC. Accordingly, the facts of this case depart from those of Parr; here, the requirement for the mailings stemmed from private convenience rather than from an independent and unrelated obligation, namely state law.

That appellees "caused" the mails to be used by the homeowners is beyond dispute. A person "causes" the mails to be used under 1341 where he "does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen even though not actually intended . . .." Pereira v. United States, 347 U.S. 1, 8-9, 74 S.Ct.

358, 363, 98 L.Ed. 435 (1954). Indeed, the Supreme Court's holding that mailings "in the ordinary course of business" are within the contemplation of section 1341 is clear support for the proposition that the exception created in Parr is narrow and that the general rule is that ordinary mailings are within the statute. Here, the homeowners were sent pre-addressed envelopes by which to remit their monthly payments. Obviously, appellees could not only foresee, but they also actually intended the homeowners to use the mails to remit such payments.

Because appellees caused the mailings in counts 2 through 30 for the purpose of executing the fraudulent scheme as alleged in the indictment, the district court erred in dismissing those

counts under presumed compulsion of the decision in United States v. Parr.

C. Application of Collateral Estoppel

[4] As set forth above, at the conclusion of their jury trial, McCarthy and Okahara moved for judgments of acquittal on the conspiracy count and on the remaining undismissed mail and wire fraud count. The district court granted the motion from the bench. Accordingly, under the Double Jeopardy Clause of the Fifth Amendment McCarthy and Okahara cannot be retried on the counts of which they were acquitted. It is immaterial whether the acquittal was by jury verdict or by a direction of the court, either after the prosecution has completed its case or after all evidence is in. In any case, where there is an acquittal or direction to the jury to

acquit, further trial on those charges is barred. United States v. Scott, 437 U.S. 82, 91, 98 S.Ct. 2187, 2193, 57 L.Ed.2d 65 (1978). The Bernhardts, however, argue that the acquittal of McCarthy and Okahara is a bar to putting them to further trial as to Counts 2 through 30. They urge us to apply nonmutual collateral estoppel against the government, We do not agree.

[5] We not initially that the Double Jeopardy Clause does not bar the trial of any of the defendants as to Counts 2 through 30 "for the obvious reason that the subject counts . . . were dismissed prior to trial, and, therefore, the defendants have not yet been placed in jeopardy." United States v. Schwartz, 785 F.2d 673, 681 (9th Cir.:), cert. denied,--U.S.--, 107 S.Ct. 290, 93 L.Ed.2d 264 (1986). As to all

appellees, however, we must analyze whether their trial is barred by the collateral estoppel doctrine.

[6] The Fifth Amendment guarantee against double jeopardy encompasses the doctrine of collateral estoppel. Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). This circuit employs a three-step process in analyzing a collateral estoppel claim. Schwartz, 785 F.2d at 681; United States v. Hernandez, 572 F.2d 218, 220 (9th Cir. 1978). First, we identify the issues in the two actions to determine whether they are sufficiently similar and material to justify invoking the doctrine. Next, the record of the prior case must be examined to decide whether there was a full and fair opportunity to litigate the issue. Finally, we must decide, based on our examination of the

record, whether the issue was necessarily decided in the prior case.

Applying the first factor, it is undeniable that the factual issues underlying count 1 and counts 31 through 66 are substantially similar to those posed by counts 2 through 30. The misappropriation of the mortgage payments mailed in by the homeowners was part of the overall scheme to defraud, as it was a source of cash to help fund the fraudulent activities of the defendants and the companies they controlled. We conclude that in the McCarthy and Okahara trial the government litigated the conspiracy charge, that part of Count 2 which set up the predicate scheme for Counts 30 through 39 (mailings by REFC to mortgage companies), Counts 45 through 48 (announcing REFC's intent to sell its

mortgage servicing portfolio), and Counts 49 through 66 (mailing monthly balances). Those counts were structually similar to the dismissed counts, albeit they argued different transactions and different times. The structure of the indictment was such that any of the counts, particularly the mail fraud counts, were bound up in a common nucleus related to the conspiracy and to the existence of the triggering scheme. Indeed, in order to present the mail fraud counts, the government had to advert to Counts 1 and 2, and in fact did so. Under these circumstances, we believe that the government had an opportunity fully to litigate as against McCarthy and Okahara that portion of the scheme which involved the obtaining of misapplication of the mortgage funds collected by REFC.

The last factor--whether the common issue involved in counts 2 through 30 and the remaining counts was necessarily decided against the government--is not so clear. In order for collateral estoppel to apply an ultimate fact must have been determined previously by a valid and final judgment if relitigation of that issue between the same parties in a future lawsuit is to be foreclosed. Ashe, 397 U.S. at 443, 90 S.Ct. at 1194. The circumstances of this case are unlike those normally present when a defendant seeks to invoke collateral estoppel to preclude a subsequent prosecution. Generally, the doctrine of collateral estoppel is invoked after the factfinder has returned a verdict of not guilty in the prior prosecution. Here, the trial of McCarthy and Okahara ended before the

case was submitted to the jury pursuant to Rule 29 of the Federal Rules of Criminal Procedure.

The district court's function is reviewing a defendant's motion for acquittal is quite narrow. The court, after viewing the evidence in the light most favorably to the government, must determine whether the jury could reasonably find the defendant guilty beyond a reasonable doubt. United States. v. Merriweather, 777 F.2d 503, 507 (9th Cir. 1985), cert. denied, 475 U.S. 1098, 106 S.Ct. 1497, 89 L.Ed.2d 898 (1986). The district court, however, must bear in mind that it is the jury's exclusive function to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts. United States v. Dreitzler, 577

F.2d 539, 545 (9th Cir. 1978), cert. denied, 440 U.S. 921, 99 S.Ct. 1246, 59 L.Ed.2d 473 (1979).

Although in granting such a motion the district court is not sitting as the trier of fact, its finding of insufficient proof of a factual element of the crime apparently may be sufficient to trigger application of collateral estoppel. See Sanabria v. United States, 437 U.S. 54, 72-73, 98 S.Ct. 2170, 2183, 57 L.Ed.2d 43 (1978) (district court's acquittal for insufficient proof of an element of the crime which was common to the second charge was treated as a "finding of fact" which stood as an absolute bar to further litigation of th at element).

Addressing the conspiracy charge, the court concluded that the evidence was insufficient to show "any agreement

or conspiracy to commit either mail fraud or wire fraud or fraud against the United States, nor . . . that the defendants, or either of them, had the intent to commit either mail fraud or wire fraud or fraud against the United States." With respect to the remaining counts, the court found that the evidence was insufficient "that the defendants, or either of them, were participants in any scheme or artifice to obtain money or property by false or fraudulent pretenses alleged in the superseding indictment." The court also found that no rational trier of fact would conclude beyond a reasonable doubt from all the evidence presented that the alleged uses of the mails were made for the purpose of executing any scheme or artifice to defraud.

These conclusions by the district court obviously are quite sweeping and highly generalized. In granting the motion, the court did not explain its reasoning or give any hint as to the weaknesses or deficiencies in the government's case. In fact, the record is devoid of any critical analysis whatsoever by the district court. Consequently, we are left to speculate about the reasons for the acquittal. Because we are mindful of the limitations upon the trial court's grant of a Rule 29 motion for a judgment of acquittal, we would hesitate to invoke collateral estoppel on such a shaky foundation.

The decision in Ashe v. Swenson, has some pertinence here and Justice Stewart's treatment of that unique case is significant. In Ashe,

three or four masked men broke into a house where six persons were engaged in playing poker. They robbed each player of money and property. They--whether three or four is uncertain--fled in the car of one of the victims. The car was found in a field and three men were arrested walking on a highway near the car. Ashe was arrested some distance away. All four were charged with robbery and theft of the car a single indictment. Ashe went to trial alone charged with robbing victim Knight. The identity was weak and Ashe was acquitted. Six weeks later Ashe was brought to a second trial for the robbery of victim Roberts. Ashe moved to dismiss based on his prior acquittal. The motion was denied. The testimony of the witnesses stronger

on identity. The jury found Ashe guilty.

After exhausting appeal and remedy be habeas, Ashe petitioned for and the Supreme Court granted certiorari. Justice Stewart addressed the term "collateral estoppel" as follows:

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in United States v. Oppenheimer, 242 U.S. 85 [37 S.Ct. 68, 61 L.Ed 161 (1916)]. As Mr. Justice Holmes put the matter in that case, "It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." 242 U.S. at 87 [37 S.Ct. at 69]. As a rule of federal law, therefore, "[i]t is much too late to suggest that this principle is

> not fully applicable to a former judgment in a criminal case, either because of lack of 'mutuality' or because the judgment may reflect only a belief that the Government had not met the higher burden of proof exacted in such cases for the Government's evidence as a whole although not necessarily as to every link in the chain." United States v. Kramer, 289 F.2d 909, 913 [(2d Cir. 1961)].

Ashe 397 U.S. at 443, 90 S.Ct. at 1194 (internal footnote omitted).

The nub of the decision in Ashe's favor was this: "The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. The jury by its verdict said that he had not. The Federal Rules of Law, therefore, would make a second prosecution for the robbery of Roberts wholly impermissible." Ashe at 445, 90 S.Ct. at 1195.

The above rationale does not fit neatly the situation involving McCarthy

and Okahara. That the government failed to prove that they conspired (count 1) or that they hatched the scheme charged against them in counts other than 2 through 30, does not imply by analogy to Ashe, that it was therefore not "rationally conceivable" that they committed the offenses in the discrete counts of 2 through 30. The government may or may not succeed in convincing the court or jury of their guilt at a trial. What we determine here is that the verdict which Judge Craig directed in their favor as to the other charges does not collaterally es top further trial on the issues which were not encompassed in that verdict.

[7] Turning now to whether the Bernhardts, who have not gone to trial because of the acquittal of McCarthy and Okahara, we are of the opinion that such

trial is in no way barred. Judge Craig did not have before him the severed counts (2 through 30) when he made his ruling. The finding that the evidence against McCarthy and Okahara was insufficient for a rational jury to have found that they were involved in conspiracy, scheme to defraud, with the requisite intent, does not render it "rationally [in]conceivable" that the Bernhardts could have been so involved. Indeed, the Bernhardts' situation is more like that in Standefer v. United States, 447 U.S. 10, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980) than that in Ashe.

Standefer, a corporate official, was indicted for his part in paying for the vacations of Niederberger, an official of the Internal Revenue Service. The indictment contained nine counts, four of which alleged illegal

gifts to Niederberger in violation of 18 U.S.C. 201(f) and five of which charged abiding and abetting the official in receiving unauthorized compensation, in violation of 18 U.S.C. 2, which took the form of paying for five vacation trips by Niederberger to Pompano Beach, Miami, Absecon, Pebble Beach and Las Vegas.

Niederberger was himself separately charged in a ten-count indictment with five counts of violating 18 U.S.C. 201(g), and five counts of violating 26 U.S.C. 7214(a)(2), which forbid the acceptance of unauthorized compensation. Niederberger was convicted after trial of four counts under 18 U.S.C. 201(g) (vacations in Miami, Absecon, Pebble Beach, and Las Vegas). He was acquitted on one 201(g) count (Pompano Beach, apparently

because the statute of limitations had run), and on three 7214(a)(2) counts (Pompano Beach, Miami, and Absecon).

After Niederberger's trial, but before start of his own, Standefer moved to dismiss the counts which charged him with aiding and abetting Neiderberger in connection with the Pompano Beach, Miami and Absecon vacations, arguing that since the sole principal had been acquitted of accepting unlawful compensation as to those trips, he could not be convicted of aiding and abetting the commission of those offenses. The district court denied the motion. Standefer admitted authorizing payments for all five trips, but claimed they were on a personal basis and not designed to influence Niederberger. The jury convicted him of all nine counts. The Court of Appeals

affirmed the conviction. The Supreme Court granted certiorari because it involved an issue "of importance to the administration of criminal justice on which the Courts of Appeals are in conflict." 447 U.S. at 14, 100 S.Ct at 2003.

In the Supreme Court, Standefer had two arguments. The first was that one charged as an aider and abettor could not be prosecuted after the principal has been acquitted of the offense charged. The second was that the government was at least barred from relitigating the issue whether Niederberger had accepted unlawful compensation in connection with the Pompano Beach, Miami, and Absecon vacations because of the doctrine of nonmutual collateral estoppel. Chief Justice Burger, writing for a unanimous

court, rejected both contentions. It is with the second argument that we are primarily concerned.

The opinion first notes:

> The doctrine of nonmutual collateral estoppel was known to the common law and to the Congress when it enacted 2 in 1909. It emerged in a civil case in 1942, Bernhard v. Bank of America Nat. Trust & Savings Assn., 19 Cal.2d 807, 122 P.2d 892 [(1942)]. This Court first applied the doctrine in Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 [91 S.Ct. 1434, 28 L.Ed.2d 788] (1971). There, we held that a determination of patent invalidity in a prior infringement action was entitled to preclusive effect against the patentee in subsequent litigation against a different defendant. Just this past Term we again applied the doctrine--this time "offensively"--to hold that a defendant who had had a "full and fair" opportunity to litigate issues of fact in a civil proceeding initiated by the Securities and Exchange Commission could be estopped from relitigating those issues in a subsequent action brought by a private plaintiff. Parklane Hosiery Co. v. Shore, 439 U.S. 322 [99 S.Ct. 645, 58 L.Ed.2d 552] (1979). In both cases, application of nonmutual estoppel promoted judicial economy and conserved private resources without unfairness to the litigant against whom estoppel was invoked.

Here, petitioner urges us to apply nonmutual estoppel against the Government; specifically he argues that the Government should be barred from relitigating Niederberger's guilt under 7214(a)(2) in connection with the vacation trips to Pompano Beach, Miami, and Absecon. That issue, he notes was an element of his offense which was determined adversely to the Government at Niederberger's trial.

This, however, is a criminal case, presenting considerations different from those in Blonder-Tongue or Parklane Hosiery. First, in a criminal case, the Government is often without the kind of "full and fair opportunity to litigate" that is a prerequisite of estoppel. Several aspects of our criminal law make this so; the prosecution's discovery rights in criminal cases are limited, both by rules of court and constitutional privileges; it is prohibited from being granted a directed verdict or from obtaining a judgment notwithstanding the verdict no matter how clear the evidence in support of guilt, cf. Fed.Rule Civ.Proc. 50; it cannot secure a new trial on the ground that an acquittal was plainly contrary to the weight of the evidence, cf. Fed.Rule Civ.Proc. 59; and it cannot secure appellate review where a defendant has been acquitted. See United States v. Ball, 163 U.S. 662, 671 [16 S.Ct. 1192, 1195, 41 L.Ed. 300] (1896).

The absence of these remedial procedures in criminal cases permits juries to acquit out of compassion or compromise or because of "'their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.'" . . . It is of course true that verdicts induced by passion and prejudice are not unknown in civil suits. But in civil cases, post-trial motions and appellate review provide an aggrieved litigant a remedy; in a criminal case the Government has no similar avenue to correct errors. Under contemporary principles of collateral estoppel, this factor strongly militates against giving an acquittal preclusive effect. [Citation omitted.]

The application of nonmutual estoppel in criminal cases is also

complicated by the existence of rules of evidence and exclusion unique to our criminal law. It is frequently true in criminal cases that evidence inadmissible against one defendant is admissible against another. The exclusionary rule, for example, may bar the Government from introducing evidence against one defendant because that evidence was obtained in violation of his constitutional rights. And the suppression of that evidence may result in an acquittal. The same evidence, however, may be admissible against other parties to the crime "whose rights were [not] violated." Alderman v. United States, 394 U.S. 165, 171-72 [89 S.Ct. 961, 965, 22 L.Ed.2d 176] (1969). Accord, Rakas v. Illinois, U.S. 128, 134 [99 S.Ct. 421, 425, 58 L.Ed.2d 387] (1978). In such circumstances, where

evidentiary rules prevent the Government from presenting all its proof in the first case, application of nonmutual estoppel would be plainly unwarranted.

447 U.S. at 21-24, 100 S.Ct. at 2006-08. The Court concluded with the following statement:

> In denying preclusive effect to Niederberger's acquittal, we do not deviate from the sound teaching that "justice must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 14 [75 S.Ct. 11, 13, 99 L.Ed. 11] (1954). This case does no more than manifest the simple, if discomforting reality that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system." Roth v. United States, 354 U.S. 476, 492, n. 30 [77 S.Ct. 1304, 1313, n. 30, 1 L.Ed.2d 1498] (1957). While symmetry of results may be intellectually satisfying, it is not required. See Hamling v. United States, 418 U.S. 87, 101 [94 S.Ct. 2887, 2899, 41 L.Ed.2d 590] (1974).

Id. at 25, 100 S.Ct. at 2008-09.

The reasoning of Chief Justice Burger in Standefer demonstrates compellingly why the mere fact that a co-

defendant has been acquitted or convicted is not to be the determinant whether other persons not acquitted, indeed not even tried, may be subject to prosecution. But in this case, there is more: the findings of the trial judge in the cases of McCarthy and Okahara never purported to hold that there was no scheme as to counts 2 through 30, or that there were no mailings with fraudulent intent as to those counts. The government has never had a "full and fair" opportunity to litigate the issues of those counts as to any of the defendants. Thus, there is no obstacle to completion of this case.

CONCLUSION

The collateral estoppel doctrine does not bar the trial of appellees McCarthy and Okahara on the dismissed mail fraud counts. Accordingly, as to

these defendants, as well as to appellees Curtis Bernhardt and Carl Bernhardt, the pretrial dismissal of counts 2 through 30 of the superseding indictment is REVERSED and the case is REMANDED for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 85-1250
Plaintiff-Appellant,	)	D.C. No. CR 85-00132-01-05
v.	)	ORDER
CURTIS J. BERNHARDT, MICHAEL F. McCARTHY, HAROLD T. OKAHARA, JR., and CARL J. BERNHARDT,	)	
Defendants-Appellees.	)	

Before: SNEED, ANDERSON, and POOLE, Circuit Judges

Pursuant to Ninth Circuit Rule 35-2, and within 15 days of this order, the United States Attorney is requested to respond in writing to the respective petitions for rehearing filed on March 10, 1988, by defendants-appellees Curtis J. Bernhardt and Carl J. Bernhardt and to

the petition for rehearing with suggestion for rehearing en banc filed on behalf of petitioners Michael F. McCarthy and Harold T. Okahara, in which the appellees Bernhardt have joined.

The Government's response shall not exceed 15 pages and should include discussion of the standing of petitioners McCarthy and Okahara to participate in this appeal.

No reply to the Government's response shall be filed unless the court shall hereafter permit.

The attention of the parties is directed to the two contemporaneous orders amending the slip sheet opinion.

C-1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 85-1250
	)	
	)	D.C. No.
Plaintiff-Appellant,	)	CR 85-00132-01-05
	)	
	)	ORDER
v.	)	
	)	
CURTIS J. BERNHARDT, MICHAEL F. McCARTHY, HAROLD T. OKAHARA, JR., and CARL J. BERNHARDT,	)	
	)	
Defendants-Appellees.	)	
	)	
	)	

Before: SNEED, ANDERSON, and POOLE, Circuit Judges

The opinion of the court filed February 25, 1988 in the above case is amended at slip page 2304 by striking the first sentence of that page and substituting in its place the following language:

The government appealed the judgment granting dismissal on double jeopardy grounds. We reversed and remanded to permit the district court to make the factual determination essential to the applicability of Bartkus v. Illinois, 359 U.S. 121 (1959). United States v. Curtis J. Bernhardt, et al., No. 85-1250, 831 F.2d 181, 183 (9th Cir. 1987). The Bernhardts' attempted appeals of the denials of their vindictive prosecution and collateral estoppel claims were dismissed as non appealable prior to trial. United States v. Curtis J. Bernhardt, et al., Nos. 86-1200 and 86-1201 (9th Cir. October 27, 1987) (unpublished).

The opinion of the court is further amended at page 2321 of the slip opinion, concluding paragraph, by striking that paragraph in its entirety and substituting the following language:

CONCLUSION

Neither the decision of the Supreme Court in Parr v. United States, 363 U.S. 370 (1960), nor the collateral estoppel doctrine constitutes a bar to the trial of appellees Curtis J. Bernhardt and Carl J. Bernhardt on the dismissed mail fraud counts. Accordingly, the judgment dismissing counts two through 30 of the superseding indictment is REVERSED and the case is REMANDED for further proceedings consistent with this opinion.

REVERSED and REMANDED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. CURTIS J. BERNHARDT, MICHAEL F. McCARTHY, HAROLD T. OKAHARA, JR., and CARL J. BERNHARDT, Defendants-Appellees.	No. 85-1250 D.C. No. CR 85-00132-01-05 ORDER

Before: SNEED, ANDERSON, and POOLE, Circuit Judges

The order of the court filed March 30, 1988 requesting the United States Attorney to respond to the petitions for rehearing filed by appellees Curtis J. Bernhardt and Carl J. Bernhardt and to the suggestion for rehearing en banc filed on behalf of appellees Michael F.

McCarthy and Harold T. Okahara, in which appellees Bernhardt have joined, is amended by striking in their entirety the second, third and fourth paragraphs, and by substituting in place thereof the following:

> The Government's response shall be due within 15 days of this amended order and shall not exceed 15 pages. No reply to the Government's response shall be filed unless the court shall expressly permit.
>
> The purpose of this amended order is to clarify that Messrs. McCarthy and Okahara were and remain appellees of record herein; that there is no issue as to their standing to petition for rehearing with suggestion for rehearing en banc; and that the remand ordered does apply to them. See order filed April 8, 1988

which amends concluding paragraph at slip op. 4036.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. CURTIS J. BERNHARDT, MICHAEL F. McCARTHY, HAROLD T. OKAHARA, JR., and CARL J. BERNHARDT, Defendants-Appellees.	No. 85-1250 D.C. No. CR 85-00132-01-05 ORDER

Before: SNEED, ANDERSON, and POOLE, Circuit Judges

The opinion of the court as amended on April 5, 1988, beginning at slip op. 4016 is further amended at slip op. 4036 by striking the paragraph under "Conclusion" and substituting in its place:first sentence of that page and substituting in its place:

Neither the decision of the Supreme Court in Parr v. United States, 363 U.S. 370 (1960), nor the collateral estoppel doctrine constitutes a bar to the trial of appellees Curtis J. Bernhardt, Carl J. Bernhardt, Michael F. McCarthy and Harold T. Okahara on the dismissed mail fraud counts, numbers two through 30. Accordingly, the judgment dismissing counts two through 30 of the superseding indictment is REVERSED as to all the above appellees and the case is REMANDED for further proceedings consistent with this opinion.

REVERSED and REMANDED.

The opinion of the court is further amended at page 2321 of the slip opinion, concluding paragraph, by striking that paragraph in its entirety and substituting the following language:

CONCLUSION

Neither the decision of the Supreme Court in Parr v. United States, 363 U.S. 370 (1960), nor the collateral estoppel doctrine constitutes a bar to the trial of appellees Curtis J. Bernhardt and Carl J. Bernhardt on the dismissed mail fraud counts. Accordingly, the judgment dismissing counts two through 30 of the superseding indictment is REVERSED and the case is REMANDED for further proceedings consistent with this opinion.

REVERSED and REMANDED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 85-1250
Plaintiff-Appellant,	)	D.C. No. CR 85-00132-01-05
v.	)	ORDER
CURTIS J. BERNHARDT, MICHAEL F. McCARTHY, HAROLD T. OKAHARA, JR., and CARL J. BERNHARDT,	)	
Defendants-Appellees.	)	

Before: SNEED and POOLE, Circuit Judges.

The panel as constituted above[1] has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

---

[1] The late Judge Anderson did not participate in the consideration or disposition of the petition.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CR.NO.85-00132
	)	
MICHAEL F. McCARTHY and HAROLD T. OKAHARA, JR.,	)	September 30, 1985
	)	Honolulu,
Defendants.	)	Hawaii
	)	

JUDGMENT OF ACQUITAL ARGUMENTS

BEFORE THE HONORABLE WALTER E. CRAIG, Judge.

[Transcript pages 43 through 48.]

fails in that respect.

And on that basis, your Honor, we submit on the strength of the memorandum we submitted to your Honor last week.

Thank you.

THE COURT: As you all know, Rule 29 of the Rules of Criminal Procedure provides in pertinent part:

The Court on motion of a defendant or of its own motion shall order the entry of judgment of acquital of one or more offenses charged in the indictment or information after the evidence on either side is closed, if the evidence is insufficient to sustain a conviction of such offense or offenses.

This Court has received and considered the defendants' motion for judgment of acquital and the government's response thereto and the accompanying

exhibits, and has reviewed both the evidence presented during the trial and the law applicable to this action. Having done so and having now heard oral arguments on defendants' motion, the Court concludes as follows:

The standard for determining whether a motion for judgment of acquital should be granted appears to be whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt.

In this case the crime charged in Count 1 of the superseding indictment is a conspiracy charge pursuant to Tile 18, United States Code, Section 371.

In order to survive a motion for judgment of acquital with respect to the crime charged in Count 1, the prosecution must have presented evidence

from which any rational trier of fact would conclude beyond a reasonable doubt, first, that there was an agreement to commit mail fraud or wire fraud or some other fraud against the United States. Secondly, that the defendants were parties to such agreement. Third, that one or more overt acts were committed in furtherance of such agreement. Fourth, that the defendants had the intent to commit mail fraud or wire fraud or fraud against the Untied States.

After reviewing the evidence in the light most favorable to the prosecution, the Court finds that the prosecution has failed to present evidence from which any rational trier of fact could conclude beyond a reasonable doubt that the defendants, or either of them, were parties to any agreement or conspiracy to commit either mail fraud or

wire fraud or fraud against the United States, nor could any rational trier of fact conclude beyond a reasonable doubt from the evidence presented that the defendants, or either of them, had the intent to commit either mail fraud or wire fraud or fraud against the United States.

Therefore, after reviewing all the evidence in the light most favorable to the prosecution, this Court concludes that the defendants' motion for judgment of acquitable as to Count 1 of the superseding indictment should be granted.

With respect to the remaining counts of the superseding indictment, the Court finds that the prosecution has failed to present sufficient evidence to allow any rational trier of fact to conclude beyond a reasonable doubt that

from which any rational trier of fact would conclude beyond a reasonable doubt, first, that there was an agreement to commit mail fraud or wire fraud or some other fraud against the United States. Secondly, that the defendants were parties to such agreement. Third, that one or more overt acts were committed in furtherance of such agreement. Fourth, that the defendants had the intent to commit mail fraud or wire fraud or fraud against the Untied States.

After reviewing the evidence in the light most favorable to the prosecution, the Court finds that the prosecution has failed to present evidence from which any rational trier of fact could conclude beyond a reasonable doubt that the defendants, or either of them, were parties to any agreement or conspiracy to commit either mail fraud or

wire fraud or fraud against the United States, nor could any rational trier of fact conclude beyond a reasonable doubt from the evidence presented that the defendants, or either of them, had the intent to commit either mail fraud or wire fraud or fraud against the United States.

Therefore, after reviewing all the evidence in the light most favorable to the prosecution, this Court concludes that the defendants' motion for judgment of acquitable as to Count 1 of the superseding indictment should be granted.

With respect to the remaining counts of the superseding indictment, the Court finds that the prosecution has failed to present sufficient evidence to allow any rational trier of fact to conclude beyond a reasonable doubt that

the defendants, or either of them, were participants in any scheme or artifice to defraud, or any scheme or artifice to obtain money or property by false or fraudulent pretenses alleged in the superseding indictment.

Furthermore, although the prosecution has presented evidence that defendants caused certain uses of the mails, viewing all the evidence int he light most favorable to the prosecution, no rational trier of fact would conclude beyond a reasonable doubt that such uses of the mails were made for the purpose of executing any scheme or artifice to defraud or to obtain money or property by means of false or fraudulent pretenses.

The prosecution has also failed to present sufficient evidence to allow any rational trier of fact to conclude beyond a reasonable doubt that the

defendants, or either of them, participated in or caused any wire transfer for the purpose of executing any scheme or artifice to defraud or to obtain money or property by means of false or fraudulent pretenses.

In reviewing all the evidence in the light most favorable to the prosecution, this Court concludes that defendants' motion for judgment of acquital as to Counts 31 through 74 of the superseding indictment should be granted.

Wherefore it is ordered, adjudged, and decreed that the defendants, and each of them, are not guilty as charged in Count 1 of the superseding indictment, and it is further ordered, adjudged, and decreed that the defendants, and each of them, are not

guilty as charged in Counts 31 through 74 of the superseding indictment.

And it is further ordered, adjudged, and decreed that the defendants, and each of them, are not guilty of a violation of Title 18, United States Code, Section2, aiding and abetting.

Call the jury.

MR. WILSON: Your Honor, with all due respect to the Court, I believe the Court has in its mind now to discharge the jury. We would ask the Court to send the jury home but not discharge them, pending our call to the Solicitor General's office to see if it will let us, the Solicitor General will let us take an interlocutory appeal from the Judge's order.

THE COURT: You can do that any time you want to.

MR. WILSON: I understand that, sir. But there are some consequences of the Court discharging the jury. We would ask the Court not to discharge the jury but to send them home until --

MR. O'CONNOR: (Interposing) Your Honor, we object to that. I think the jury should be discharged and the case should be ended.

THE COURT: I do too.

Call the jury.

Your request is denied.

(Proceedings in the presence of the jury:)

THE COURT: The record may show the presence of the jury, the presence of the defendants and their counsel, and the presence of the United States Attorney.

Ladies and gentlemen, the Rules of Criminal Procedure, and particularly

Rule 29, in pertinent part provide as follows:

The Court on motion of a defendant or of its own motion shall order the entry of judgment of acquital of one or more offenses charged int he indictment or information after the evidence on either side is closed, if the evidence is insufficient to sustain a conviction of such offense or offenses.

The government having rested its case in this matter and the Court having received from the defendants a motion for judgment of acquital has granted that motion.

Therefore you are relieved of any responsibility, further responsibility.

I want to thank you all for your careful attention throughout the course of this lengthy trial. I now it

was boring sometimes, but it's interesting to dwell on the fact that the government of the United States calls on its citizens to devote their time in only two instances; one is in the armed services in times of national emergency, and the other is to serve on a jury. So it's interesting to note those two factors.

Thank you gain for your careful attention and consideration throughout the course of the trial. You will be excused at the conclusion of these proceedings until further notice from the clerk's office.

I wish to commend Mr. Mayo in the presentation of the government's case, and Mr. O'Connor and Mr. Weight in their representation of their respect clients.

Court will stand adjourned.

(Proceedings concluded.)